TELECOMMUNICATIONS

H.R. 4620

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U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

IDENTICAL LETTER TO HON. WILLIAM D. FORD

Office of the Assistant Attorney General

Washington, D.C. 20530

29 MAY 1984

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Honorable Jack Brooks
Chairman
Committee on Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter is in response to your request for the views of the Department of Justice on H.R. 4620, a bill to prohibit the overhearing or recording of conversations on the federal telecommunications system. This report will address the bill as reported.

The Department of Justice is vigorously opposed to the enactment of this legislation as we believe it would seriously interfere with federal law enforcement and national security efforts and because it does not take into consideration other situations where overhearings or recordings would be proper. In providing limited exceptions, the legislation also creates many unnecessary requirements which encumber the agencies and persons affected.

A. Background

Section 2511(2)(c) and (d) of Title 18, United States Code, operates to exempt one-party consensual interceptions from the prohibitions of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§2510 et seq.) unless the interceptor (1) is not acting under color of law and (2) intercepts for a criminal, tortious, or other injurious purpose. Otherwise, there is no federal statutory law which prohibits the surreptitious, one-party consensual interception of communications.

The General Services Administration (GSA), pursuant to its authority to issue rules relating to the management and disposal of government property (40 U.S.C. §486(c)), promulgated regulations for the use of the federal telecommunications system. 41 C.F.R. Part 101-37. A portion of the regulations prohibits, with exceptions nearly identical to those contained in H.R. 4620,

cc: DAG, Criminal, OIPR, OMB, Hon. Frank Horton, Hon. Gene Taylor, Hon. Hamilton Fish

one-party consensual interception of communications. As will be apparent from the discussion below, we do not believe that these regulations should be codified.

B. Proposed Legislation

H.R. 4620 would amend title I of the Federal Property and Administrative Services Act of 1949 by adding a new section 113. Subsection (a) of that new section would prohibit a federal employee from causing or permitting the recording or listening in upon any telephone conversation conducted on the federal telecommunications system. It would also prohibit a federal employee from causing or permitting the recording or listening in upon any telephone conversation between a federal employee and another person if the call "involves the conduct of Government business."

Although the phrase "federal telecommunications system" is not defined in the bill, a definition exists in 41 C.F.R. §101-37.105-2. The Code of Federal Regulations definition "includes the intercity voice network, the consolidated local telephone service ... and other networks which are for the exclusive or common use of Federal agencies or support Government business." Consequently, a call made from or to nearly any federal telephone would seem to be within the bill's reach. In addition, the bill apparently would prohibit the one-party consensual recording of a telephone call if a federal employee spoke on his or her home telephone "involv[ing] the conduct of Government business."

Subsection (b) exempts from the prohibition found in subsection (a) the recording of or listening in upon a conversation without the consent of any party to it when the recording or listening in is authorized under the Omnibus Crime Control and Safe Streets Act of 1968 or the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. §§ 1801 et. seq.).

Subsection (c) permits the recording of or listening in upon a conversation with the consent of one party to it when the recording or listening in is performed (1) for law enforcement purposes; (2) for counterintelligence purposes; (3) for military command instructions; (4) for counterterrorism purposes; (5) for public safety purposes; (6) by a handicapped employee as a tool necessary to that employee's performance of official duties; or (7) for service monitoring purposes.

Subsection (d) permits the recording of or listening in upon a conversation with the consent of all parties to the conversation. Included within this category are telephone conferences, secretarial recordings, and other acceptable administrative practices conducted pursuant to strict supervisory controls to eliminate possible abuses.

Subsection (g) provides that any recording or transcription of a conversation made in violation of the Act would be a Federal criminal offense.

C. Effect on Law Enforcement

An analysis of subsection 113(c)(1), the provision which would permit one-party consensual interceptions of communications for law enforcement purposes, reveals that it suffers initially from a drafting problem which renders its meaning unclear. The subsection provides that the general prohibition against recording or listening in does not apply when these activities are performed for law enforcement purposes "in accordance with procedures established by the agency head, as required by the Attorney General's guidelines for the administration of the Omnibus Crime Control and Safe Streets Act of 1968, and in accordance with procedures established by the Attorney General." Nothing in the 1968 Act specifically authorizes or requires the Attorney General to establish guidelines or procedures for one-party consensual monitoring and, at present, there are no such guidelines or procedures. Consequently, because of this inaccuracy, and the ambiguity it creates for section 113(c)(1), the bill may not provide a viable law enforcement exemption.

The Attorney General has required agency heads to adopt rules concerning the consensual interception of telephone communications in former versions of his "Memorandum to the Heads and Inspectors General of Executive Departments and Agencies re: Procedures for Lawful, Warrantless Interceptions of Verbal Communications."[1] The most recent version of that memorandum, dated November 7, 1983, contains no such requirement.

Even if the law enforcement exemption were redrafted to eliminate the reference to nonexistent guidelines and procedures, the exemption would still be troublesome. A system which envisions each agency's establishing its own regulations for law enforcement purposes when, in fact, many of these agencies have

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1 This memorandum is not issued under authority or requirement of the Omnibus Crime Control and Safe Streets Act of 1968. The sources of authority for the Memorandum are Executive Order No. 11396 ("Providing for the Coordination by the Attorney General of Federal Law Enforcement and Crime Prevention Programs"), Presidential Memorandum ("Federal Law Enforcement Coordination, Policy and Practices") of September 11, 1979, Presidential Memorandum (untitled) of June 30, 1965 on, inter alia, the utilization of mechanical or electronic devices to overhear non-telephone conversations, and the inherent authority of the Attorney General as the chief law enforcement officer of the United States.

no expertise in the law enforcement arena, may not only prove difficult to coordinate but may result in regulations incompatible with effective law enforcement efforts.

Moreover, the law enforcement exemption is so narrowly drafted that it does not cover a number of situations in which a one-party consensual recording would be reasonable and proper. If, for example, a federal employee in good faith surreptitiously records a telephone conversation in which he is offered a bribe, but in doing so violates a procedure established by his agency, he would be in violation of the provisions of the bill. Consequently, a court might suppress the recording and any derivative evidence at the subsequent bribery trial. The law enforcement exception in subsection (c)(1) also does not cover situations in which a federal employee receives a threatening or obscene telephone call, or a call in which he suddenly realizes he is about to be offered a bribe, and records it in an attempt to provide evidence for use against the caller even though time constraints have precluded his complying with procedures established by his agency for making such a recording.

In short, we see no reason to forbid any listening in or recording, with the consent of one party to the conversation, made by a law enforcement official acting within the scope of his employment or by a person acting under the direction of such a law enforcement official.[2] California, which has a statute similar in many respects to H.R. 4620, effectively exempts law enforcement agents and persons assisting them from its scope. Similarly, any employee who reasonably and in good faith believes he is being contacted about a crime such as a kidnaping or extortion demand or who is the subject of an obscene or harassing telephone call should be permitted to record it. In this connection, it should be noted that Section 633.5 of the California Penal Code allows the recording by persons other than law enforcement personnel of conversations to which they are a party for the purpose of obtaining evidence relating to certain violent felonies, extortion, and bribery. We agree with this basic policy, but see no reason why one-party consensual recordings of conversations relating to any type of crime should not be permitted.

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2 By "law enforcement official" we mean any federal employee authorized by law or regulation to engage in or supervise the prevention, detection, investigation, or prosecution of violations of law and also jail and prison guards and officials.

D. Effect on Existing Government Intelligence and Security Programs

H.R. 4620 expressly exempts from its prohibitions listening in or recording for counterintelligence purposes in subsection (c)(2) but this exemption is also too narrow to cover all necessary national security activities. It is not clear whether the bill authorizes an exemption for positive foreign intelligence purposes as distinct from counterintelligence activities. The recording and overhearing by an intelligence agency official acting within the scope of his employment relating to either intelligence gathering or counterintelligence activities is proper under present law and must continue. The proposed exemption is simply inadequate.

In the area of communications security, the bill is also deficient. Section 113(b) exempts recording and overhearing without the consent of any of the parties when conducted in accordance with the requirements of "the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et. seq.), or other applicable law." While the Foreign Intelligence Surveillance Act (FISA) governs some electronic surveillance testing, training, and audio countermeasures, not all communications security activities are covered by FISA. The provision allowing recording and overhearing authorized by "other applicable law" is important. Even such an exemption, however, may not be broad enough to cover communications security measures that are conducted today. Such security monitoring, conducted primarily by the Department of Defense and the National Security Agency, involves listening to, copying, or recording communications transmitted over official telecommunications systems to determine the degree of protection being afforded to classified information by the users of those systems. This program is intended to provide insight into the nature and extent of classified information available to foreign powers that might monitor United States communications systems, and to assess the effectiveness of measures designed to protect such information from unauthorized persons.

The legality of these communications security monitoring activities is based on the fact that persons using the system have been provided with one or more of several permissible forms of explicit notice that the system is subject to communications security monitoring and that by using the system they have thereby consented to the monitoring of their communications. As to individuals who are communicating with persons utilizing a monitored system, since at least one of the parties to the communication has consented, the monitoring is lawful. See, e.g., United States v. White, 401 U.S. 745 (1971); Executive Order 12333, section 3.4(b). The communications security

procedures approved by the Attorney General are designed to protect the interests of such individuals by restricting the use and dissemination that may be made of their communications.

In addition to standard communications security monitoring, the Defense Department conducts another type of communications security activity, termed "hearability surveys", that could be affected by the enactment of H.R. 4620, but which would be authorized by an exception for recordings and interceptions performed by a federal agency for communications security in accordance with procedures promulgated by the agency and approved by the Attorney General. A "hearability survey" is a communications security activity in which radio communications are monitored to determine whether a particular radio signal may be intercepted by other persons or governments at one or more locations, and to determine the quality of reception over time.

Hearability surveys are also governed by Defense Department procedures that were approved by the Attorney General on October 4, 1982, under Executive Order 12333. While the content of a conversation may be overheard during the course of a hearability survey, the procedures stipulate that such contents cannot be recorded or included in any report resulting from the survey. The procedures further provide that, where practicable, the Defense Department will obtain the consent of the owner or user of a facility that will be subjected to a hearability survey prior to conducting the survey.

Communications security, therefore, encompasses a broader range of activities than those included in the bill's exemption for one-party consensual recording or listening in for counter-intelligence, counterterrorism, or military command purposes. Any communications security performed by a federal agency in accordance with appropriate agency procedures should be permitted if approved by the Attorney General as under current law. Such an exemption would allow the continuation of existing security monitoring programs which take place both within and outside the United States. Authority to conduct this monitoring is derived from Executive Order 12333, "United States Intelligence Activities," 3 C.F.R. 200 (1981), and the National Communications Security Directive (June 20, 1979), promulgated under Executive Order 12036. Both the Directive and Executive Order 12333 require the promulgation of communications security monitoring procedures which must be approved by the Attorney General. New communications security procedures that reflect the authorities in Executive Order 12333 were approved by the Attorney General on January 9, 1984. These procedures govern the communications security activities of the Defense Department, National Security Agency, and other agencies that may have a need for such a program.

E. Scope of the Proposed Legislation

Apart from the numerous problems which the bill as currently drafted would present for law enforcement and intelligence operations, the criminal offense it creates in proposed section 113(g) is too broad. First, it contains no intent requirement and so would cover even accidental recordings. Second, it punishes the mere act of recording a conversation without the consent of all parties to it even if there is no breach of the privacy or security of the conversation (as when a third party "taps" into a telephone line and overhears the conversation without the consent or knowledge of either party). A breach of trust that the specific words, tone, and inflection of the conversation are limited to the parties to it does not occur until a recording is furnished to or played for a person not a party to the conversation. Third, this type of conduct does not warrant either a jail term or the automatic forfeiture of the violator's office. Any punishment should be limited to financial sanctions along with whatever administrative sanctions are established by the offender's agency. These sanctions could, in appropriate cases, include dismissal.

We also believe that the provisions in proposed subsections 113(e) and (f) should not be included in the bill. They contain burdensome requirements that each agency head approve written procedures for recording conversations for public safety purposes, recording by handicapped persons, and recording for service monitoring purposes. They also provide for review of these procedures by the General Services Administration. The paperwork that would be mandated is completely out of line with any benefit. We think, for example, that each handicapped employee's supervisor should determine whether he needs to make recordings and that such matters are not the proper concern of an agency head. Moreover, we think it is unwise to attempt to regulate the circumstances in which agencies listen in on conversations of their employees for service monitoring purposes as is done in proposed subsection 113(e). Each agency should be allowed to develop its own service monitoring programs once the agency head determines that supervisory monitoring is required to effectively perform the agency's duties. Congress remains free to review these programs.

We are also disturbed by the fact that the definition of "federal officer and employee" as contained in the bill does not expressly include members of Congress, the federal judiciary, or their staffs. Surely there is no greater reason to include members of the Executive Branch in any restriction on listening-in or recording. On the other hand, independent employees should not be included since private citizens are not covered and thus it is unlikely they would be familiar with these or any other special regulations imposed on Government employees alone.

Finally, in our view, a new statute concerning one-party consensual recording and overhearing of telephone conversations by federal employees should not be made a part of the Federal Property and Administrative Services Act which is administered by the General Services Administration. The appropriate place, if any, for such a statute would be in Title 5, United States Code.

CONCLUSION

As the above discussion illustrates, the Department of Justice has serious objections to H.R. 4620 not only in terms of its drafting but in terms of weighing its overall need and value against the present and future anticipated and unanticipated problems it creates. As you know, Congress has labored for years to develop a balanced statutory scheme in the complex and highly technical area of electronic surveillance -- an area which already embraces three separate statutes.[3] Any additional legislation must be crafted carefully to comport with that scheme and must avoid preventing legitimate and necessary uses of electronic surveillance. Similarly, in this complex area which involves numerous federal agencies and affects a wide variety of highly sensitive activities, it is important that administrative flexibility be maintained. A statute that would flatly prohibit consensual monitoring except in very fixed and limited circumstances would severely restrict this flexibility and is an over-reaction to conduct which did not involve law enforcement or intelligence activities. We believe that the nature of the activity here does not merit a federal criminal statute, but would be better addressed administratively through regulations in a manner that would not raise the concerns discussed above.

In any event, as this letter demonstrates, it is simply impossible to anticipate all the situations where an exemption would be proper. There should be a device for rapidly authorizing exemptions as the need materializes. Even the regulatory process, let alone the legislative process, is ill-equipped to do this.

For the reasons set forth above, the Department of Justice vigorously objects to H.R. 4620 as reported by Committee. We believe the bill would have serious adverse effects upon law enforcement and intelligence activities without contributing in any meaningful way to individual privacy.

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3 The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510 et seq.; The Foreign Intelligence Surveillance Act, 50 U.S.C. §§1801 et seq.; and 47 U.S.C. §605 which protects the privacy of radio communications.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Robert A. McConnell
Assistant Attorney General
Office of Legislative and
Intergovernmental Affairs